United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7283

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IN THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL H. SLOAN,
SAMUEL H. SLOAN & CO.,

Plaintiffs-Appellants

v.

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants-Appellees

On Appeal from the United States District Court
For the Southern District of New York

ANSWERING BRIEF OF THE SECURITIES
AND EXCHANGE COMMISSION, APPELLEE

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CITATIONS

Cases:

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether this appeal should be dismissed because the appellant is in contempt of an order of a United States District Court and a fugitive, having evaded an order of the district court to appear for sentencing with respect to that contempt.

2. Whether the district court properly dismissed the complaint in this action insofar as it sought relief against the Commission when it contained nothing more than allegations with respect to the performance of statutory duties by the Commission, conclusory allegations of violations of the anti-trust laws and legally insubstantial Constitutional challenges to long-standing provisions of the federal securities laws.

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the district court, entered on February 27, 1975, dismissing the complaint in this action as to all defendants without leave to re-plead (Joint Appendix 3-4, 270) (hereinafter App. __). 1/

The complaint in this action was initially filed on June 27, 1974, with the Commission as the sole defendant (App. 5-8). Following a pre-trial conference held on September 18, 1974, the district court determined

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1/ The Commission and its co-defendants the National Association of Securities Dealers, National Clearing Corporation, National Quotation Bureau, Bunker Ramo Corp. and Disclosure, Inc., (by oral application only) had all been heard on February 14, 1975, before Judge Griesa on motions for dismissal or for summary judgment. Mr. Sloan's Complaint had also named "the United States of America as the Securities and Exchange Commission." While the United States was never served until February 24, 1975 (App. 4), Mr. Sloan had moved on February 7, 1975, for entry of a default judgment against it which was denied (App. 3). The United States Attorney for the Southern District of New York has filed a brief in this appeal urging affirmance of the district court's dismissal of the action.

Mr. Sloan also moved the district judge for orders disqualifying counsel for the Commission, for the National Clearing Corporation, the National Association of Securities Dealers and the National Quotation Bureau from appearing in this proceeding. Judge Griesa denied these motions as "absolutely frivolous" (App. 301-302, 313).

that the complaint was "too vague and lacking in specifics" (App. 16), and granted Mr. Sloan leave to file an amended complaint on or before October 2, 1974 (App. 16). While Mr. Sloan did not comply with that directive, on October 21, 1974, the district court granted a motion by Mr. Sloan to file his amended complaint out of time, the Commission having interposed no objection (App. 25). Accordingly, on October 22, 1974, Mr. Sloan filed an amended complaint forty pages in length containing 309 numbered paragraphs. In addition to the Commission, the amended complaint named six other defendants. The five counts of the Complaint may be summarized as follows:

Count I

Count I of the Complaint contains the plaintiff's broad assertions of unconstitutionality with respect to the Securities Exchange Act. It asserts that the statute itself, along with all the rules and regulations promulgated thereunder, are unconstitutional and avers that the Commission's rulemaking authority under the Exchange Act represents an unconstititional delegation of authority by the Congress and the President prohibited by Article I, Section 1 of the Constitution. The first Count also asserts that the Act as a whole and the entire body of rules promulgated under the Act are unconstitutionally vague and uncertain violating the Bill of Rights and the Fourteenth Amendment, that they are violative of the

right of contract and other unspecified Constitutional rights and that the statute and rules exceed the boundaries of the Commerce Clause. 2/

The First Count specifically attacks Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa, as unconstitutional in that, in reposing exclusive jurisdiction in the federal courts of all actions brought under that Act and the rules thereunder, it allegedly interfers with the jurisdiction of state courts, and that it violates other unspecified rights. Constitutional challeges are also made with respect to sections 15(c)(5) and 19(a)(4) of the Securities Exchange Act, 15 U.S.C. 78o(c)(5) and 78s(a)(4) (Summary trading suspension power); 3/ Commission Rule 15c2-11, 17 C.F.R. 240 15c2-11, (anti-manipulative rule with respect to the initiation

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2/ Mr. Sloan's "blunderbuss attack upon the Securities Exchange Act and the regulatory scheme created by that Act has already been considered by this Court and rejected as frivolous. Samuel H. Sloan v. Securities and Exchange Commission, No. 74-2457, October 15, 1975.

3/ Mr. Sloan's challenges to these provisions have also been considered previously by this Court on petition for review of trading suspensions entered pursuant thereto. Samuel H. Sloan v. Securities and Exchange Commission, No. 74-2457, October 15, 1975. The petition for review was dismissed without prejudice because Mr. Sloan had not sought an administrative remedy before the Commission wherein an adequate factual record could be made for review by the Court of Appeals. Subsequently, Mr. Sloan demanded a hearing before the Commission; he was advised that the Commission would entertain a petition setting forth factual allegations in support of his contention that the Commission had abused its discretion in entering the trading suspension involved. No such petition has been received by the Commission as of this date.

of quotations by broker-dealers in the media); Commission rule 15c3-1, 17 C.F.R. 240.15c3-1 (broker-dealer net capital rule); Commission Rule 17a-5, 17 C.F.R. 240.17a-5 (reports required to be filed by broker-dealers with the Commission); and Section 12(g) of the Securities Exchange Act, 15 U.S.C. 781(g) (reporting requirements for certain issuers of securities).

Count II

In Count II of the complaint the plaintiff seeks money damages and declaratory relief with respect to certain alleged acts on the part of the Commission and members of its staff which Mr. Sloan asserts were unconstitutional, arbitrary, capricious and abusive of delegated authority, including the Commission's suspension of trading in certain securities. Plaintiff also asserts that his Constitutional rights, including a right of privacy, were violated because a Commission investigator allegedly telephoned his mother at her residence in Lynchburg, Virginia, and asked her questions concerning a purported contribution of capital by Mrs. Sloan to Samuel H. Sloan & Co., then a registered broker-dealer in securities. 4/ A similar claim of privacy said to be protected by the Constitution and allegedly violated by the Commission is made with respect to the Commission's investi-

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4/ The registration of Sloan & Co. was subsequently revoked by the Commission on April 28, 1975. That order is presently before this Court on petition for review. Samuel H. Sloan v. Securities and Exchange Commission, No. 75-4087.

gators having questioned an employee of Sloan & Co. and having prepared an affidavit for her signature.[5/] Count II also alleges that the Commission was acting lawlessly when it investigated the circumstances under which an attorney, who purported to represent Mr. Sloan as an advocate, also prepared and filed financial documents with the Commission purportedly as an independent auditor for Sloan & Co.; that the refusal of the Commission to have accepted certain amendments to his broker-dealer registration was arbitrary, capricious and an abuse of delegated authority. Count II asserts that it is unconstitutional for the Commission to require by rule that he, as a broker-dealer, submit certified financial statements on the Commission's Form X-17a-5 and that he suffered injury because Rule 15c3-1, 17 C.F.R. 240.15c3-1 required him to adjust his net capital to reflect the fact that trading had been suspended in securities in which he held positions.[6/]

5/ The alleged facts with respect to this particular incident are contained in paragraph 143 of the Complaint. While that paragraph makes reference to an Icelandic Airlines DC-8 ground accident which caused the death of the Sloan employee's "boyfriend and paramour," (App. 43), as well as references to unspecified threats directed at Mr. Sloan by acquaintances of the Sloan employee involved, it is not clear whether or not Mr. Sloan seeks to impose liability upon the Commission for these unhappy events.

6/ This adjustment is commonly referred to as a "haircut".

Count III

While the introductory language of Count III names the Securities and Exchange Commission with the other defendants in this action in connection with alleged violations of the Sherman and Clayton Acts, no specific conduct on the part of the Commission is alleged in Count III and no specific relief is requested against the Commission in that Count.

Count IV

Count IV of the Complaint purports to be an action based upon common law fraud as well as Section 10(b) of the Exchange Act, 15 U.S.C. 78(j)(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. The Plaintiff alleges that the Commission has committed violations in failing to give adequate and accurate reasons for suspending trading in securities and in discouraging, in some unspecified way, broker-dealers from entering quotations in the "pink sheets."

Count V

In Count V of the Complaint, Mr. Sloan asserts that he is entitled to damages in the amount of $200,000 as a result of unspecified information allegedly given by an unspecified employee of the Commission to one Jack Thompson regarding Albro Industries.

In his ad damnum Mr. Sloan sought judgment in the amount of $29,600,000, a declaratory judgment holding the Securities Exchange Act and all the rules promulgated thereunder to be unconstitutional, and a declaratory judgment holding certain acts of the Commission to have been unconstitutional, arbitrary, capricious, and abusive of delegated authority.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPELLANT IS A FUGITIVE FROM JUSTICE IN OPEN DEFIANCE OF THE ORDERS OF A UNITED STATES DISTRICT COURT.

Consistent with this Court's disposition on January 7, 1976, of three other appeals by Mr. Sloan, [7] the instant appeal should be dismissed.

On January 17, 1975, the United States District Court for the Southern District of New York (Ward, J.) entered a preliminary injunction directing Mr. Sloan to permit the Commission to inspect his books and records as a broker-dealer in securities. Securities and Exchange Commission v. Samuel H. Sloan, individually and d/b/a Samuel H. Sloan & Co., S.D. N.Y., No. 74 Civ. 5729 (RJW), C.A. 2, No. 75-7056, appeal dismissed, January 7, 1976. [8] On several

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7/ Securities and Exchange Commission v. Samuel H. Sloan, Samuel H. Sloan & Co., No. 74-1436; Securities and Exchange Commission v. Samuel H. Sloan, individually and d/b/a Samuel H. Sloan & Co., No. 75-7056; Securities and Exchange Commission v. Canadian Javelin, Ltd., et al., Samuel H. Sloan, applicant for intervention, No. 75-7046.

In disposing of those three cases, this Court relied upon its decision in United States v. Sperling, 506 F.2d 1323, 1345 n. 33 and authorities cited therein. In Sperling this Court dismissed the appeal of a criminal defendant because he had escaped from custody.

8/ Mr. Sloan had advised the Commission that he intended to resume active market-making activities while denying the Commission access to his books and records. At that time Mr. Sloan had already been permanently enjoined from violations of the record-keeping and net capital provisions of the federal securities laws. Securities and Exchange Commission v. Samuel H. Sloan, Samuel H. Sloan & Co., S.D. N.Y., No. 71 Civ. 2695, C.A. 2, No. 74-1436, appeal dismissed, January 7, 1976.

occasions subsequent to the entry of the preliminary injunction the Commission sought to arrange an inspection of Mr. Sloan's books and records and on each occasion Mr. Sloan refused. Accordingly, on March 24, 1975, the Commission moved the district court for an order adjudging the appellant to be in civil contempt of Judge Ward's preliminary injunction. On July 22, 1975, Judge Ward filed a memorandum opinion in which it was found that the defendant had wilfully violated his order requiring Mr. Sloan to permit an inspection by representatives of the Commission of his books and records. Mr. Sloan moved for re-argument, which motion was denied. On September 3, 1975, Judge Ward entered an order giving Mr. Sloan twenty more days in which to purge himself of the civil contempt by permitting inspection. Failing that, Mr. Sloan was ordered to appear before Judge Ward on September 26, 1975, for sentencing. In the interim, Mr. Sloan sought a stay of the civil contempt order before this Court. Despite the fact that this Court, in Mr. Sloan's presence, denied the stay on September 26, 1975, Mr. Sloan failed to appear before Judge Ward on the afternoon of that day as ordered. The district judge, therefore, authorized the Commission's counsel to present a certified copy of the civil contempt order to the United States Marshall who would then be directed to arrest Mr. Sloan and confine him until he should permit inspection of his books and records.

Mr. Sloan sought relief before the Supreme Court of the United States by making application to Mr. Justice Marshall for a stay of the civil contempt. Mr. Justice Marshall declined to grant that relief on October 3, 1975. While the United States Marshall has been authorized to apprehend Mr. Sloan, to our knowledge, this has not occurred. Mr. Sloan has advised the Commission's staff that his address until further notice is in Iceland.

Mr. Sloan should not be permitted to invoke the processes of the federal courts when he is unwilling to abide by the decisions of those courts; and he certainly should not be permitted to prosecute an appeal while he is a fugitive from justice and in contempt of court.

II. THE DISTRICT COURT PROPERLY DISMISSED THIS ACTION IN ALL RESPECTS.

A. The Commission, As An Agency of the United States Government, May Not Be Sued Absent the Consent of Congress.

The caption of this action named only the Commission, not its Comissioners. As a federal agency, created by Congress in Section 4 of the Securities Exchange Act, 15 U.S.C. 78(d), the Commission may be sued only in such manner as Congress authorizes. Congress has neither explicitly nor impliedly consented that the Commission be sued, as distinguished from having its orders reviewed by Courts of Appeals and its rules challenged in Commission actions to enforce them. 9/

9/ The appellant makes a casual reference to the Federal Tort Claims Act, 28 U.S.C. §2671 et seq., in his brief at p. 21 (Br. 21). But he made no attempt to assert a claim under that act below. Moreover, he made not even a colorable attempt to assert a claim under that act administratively which is an absolute prerequisite to institution of a lawsuit. 28 U.S.C. §2675. Even if he had asserted such a claim it would have failed because all of the alleged acts complained of with respect to the Commission would have been "in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. §2680(a) (See, Brief of the United States of America, pp. 5-6).

Disposition of the jurisdictional question with respect to the Commission is governed by the well-established principle of Blackmar v. Guerre, 342 U.S. 512, 515 (1952). Dismissing a complaint against the Civil Service Commission, the Supreme Court there stated:

> ". . . When Congress authorizes one of its agencies to be sued eo nomine, it does so in explicit language, or impliedly so because the agency is the offspring of such a suable entity. See Keifer & Keifer v. R.F.C., 306 U.S. 381, 390."

It has been expressly held that the Securities and Exchange Commission may not be sued eo nomine. Holmes v. Eddy, 341 F.2d 477, 480 (C.A. 4, 1965); M. G. Davis & Co. v. Securities and Exchange Commission, 252 F. Supp. 402 (S.D. N.Y.); cf., Koss v. Securities and Exchange Commission, 364 F. Supp. 1321, 1327 n. 14 (S.D. N.Y. 1973).[10/]

B. Even If This Action Were Treated As a Suit Against The Individual Members of the Commission They Are Immune From Suit For Liability In Damages When Acting Within The Scope of Their Official Duties.

In sustaining the doctrine of official immunity from money damage liability, the Supreme Court has explained its purpose as follows: it leaves government officials ". . . free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties -- suits which would consume time and energy which would

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10/ Mr. Sloan (Br. 14), correctly notes that the Commission's citation to the Koss case in the district court contained a typographical error. He is incorrect in his contention that the case, cited with the "cf." signal, was used incorrectly as a matter of substance. In Koss the district court noted that the jurisdictional defect in naming the agency itself could be cured by the defendants' joinder of the Commissioners themselves. But Mr. Sloan did not seek to make such a correction in this case.

otherwise be devoted to governmental service and the threat of which suits might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." Barr v. Matteo, 360 U.S. 564, 571 (1959). See also, Howard v. Lyons, 360 U.S. 593 (1959). It is sufficient to make the privilege applicable if the actions complained of are within the "outer perimeter" of the defendant's line of duty. Barr v. Matteo, supra, p. 575. And the motives and intent of the employee in performing the acts are irrelevant. Barr v. Matteo, supra, at 575. 11/

The individual members of the Securities and Exchange Commission are not named defendants and have not been served as such. Nonetheless, plaintiff asserts (App. 27) that the Commissioners "are being sued individually and in their official capacity." Whether the members of the Commission are defendants in fact or not, all conduct charged related to the investigation of possible violations of the federal securities laws and rules duly promulgated pursuant to those laws, to enforcement of those statutes and rules or to the promulgation of rules pursuant to statutory authority -- functions plainly within the scope of the Commissioners' official duty. Accordingly, insofar as it seeks damages against the members of the Commission, the complaint was properly dismissed. Holmes v. Eddy, 341 F.2d 477, 479 (C.A. 4, 1965).

11/ The classic statement of the rationale for this doctrine of privilege, made by Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (C.A. 2, 1949), certiorari denied, 339 U.S. 949 (1950) (quoted with approval by the Supreme Court in Barr v. Matteo, supra, at 571-572):

> "The justification for [the privilege] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."

C. The Appellant Has Not Stated a Cognizible Cause of Action Against the Commission Under the Federal Anti-Trust Laws.

While in Count III of his complaint (the anti-trust count), Mr. Sloan alleges violations of the federal anti-trust laws by the Commission and its co-defendants, all demands for specific monetary amounts are directed to defendants other than the Commission. But whatever Mr. Sloan's intentions with respect to recovery on Count III are, in view of the traditional insulation of agencies of the federal government and their officials from money damage liability, it is plainly frivolous to suggest that Congress, in adopting the Sherman and Clayton Acts, intended to impose, by implication, the severly punitive remedy of treble damages upon them. 12/

12/ Such a construction is particularly unrealistic in view of the fact that Congress found it necessary to make express affirmative statements to include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country . . ." within the meaning of "person" for purposes of imposing anti-trust liability. See 5 U.S.C. §§7, 12. Indeed, in holding that the United States was not a "person" entitled to stand as a plaintiff in a treble damage action under the Sherman Act, the Supreme Court expressed the view that "if the purpose was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name." United States v. Cooper Corp., 312 U.S. 600, 606 (1940) (citation omitted).

It has consistently been held that the States and their instrumentalities are immune from liability under the federal anti-trust laws. See, Parker v. Brown, 317 U.S. 341, 351 (1942); State of New Mexico v. American Petrofina, Inc., 501 F.2d 363, 367-379 (C.A. 9, 1974); Padgett v. Louisville and Jefferson County Air Board, 492 F.2d 1258, 1259 (C.A. 6, 1974). Saenz v. University Interscholastic League, 487 F.2d 1026, 1028 (C.A. 5, 1973); Ladue Local Lines, Inc. v. Bi-State Development Agency, 433 F.2d 131, 135 (C.A. 8, 1970). It would be a peculiar result indeed if it were determined that a federal agency were not similarly shielded from anti-trust liability.

D. Appellant Did Not Set Forth A Legally Sufficient Cause of Action Based Upon The Unconstitutionality Of Various Provisions Of The Federal Securities Laws And In Any Event Has Already Had An Opportunity To Litigate Most Of These Challenges Before This Court

This Court has already determined that Mr. Sloan's broad constitutional attack upon the Securities Exchange Act and the rules promulgated by the Commission thereunder is frivolous. Samuel H. Sloan & Co. v. Securities and Exchange Commission, No. 74-2457, dismissed without prejudice, October 15, 1975. In dismissing Mr. Sloan's petition for review of a series of trading suspensions in the securities of Canadian Javelin, Limited, this Court there determined that Mr. Sloan would have to seek administrative redress before the Commission itself prior to seeking court review (See, n. 3, supra). That holding is determinative here with respect to the allegations in Counts I, II, and IV, [13/] of the plaintiffs' complaint concerning the Commission's suspension of various stocks in which Mr. Sloan claimed to have an interest.

13/ In Count IV Mr. Sloan baldly asserted violations by the Commission of Commission Rule 10b-5, 17 C.F.R. 240.10b-5 and common law fraud based upon the Commission's allegedly "suspending trading in securities without giving adequate and accurate reasons therefor and by discouraging broker-dealers from entering quotations in the pink sheets" (App. 63). In dismissing Count IV, the district judge correctly characterized it as "a particularly irrational claim" which "merits no discussion" (App. 311).

Mr. Sloan's assertion that Commission Rule 15c2-11, 17 C.F.R. 240.15c2-11,[14] is unconstitutional has been fully briefed in this Court in No. 75-7056, involving Mr. Sloan's appeal from an order of the United States District Court for the Southern District of New York preliminarily enjoining him, inter alia, from further violations of that provision. As we have noted (pp. 8-10, supra) that appeal was dismissed because Mr. Sloan refused to purge himself of an order adjudging him to be in civil contempt of that injunction, refused to submit to sentencing by Judge Ward and is, at present, a fugitive. Should this Court believe it should reach the merits of this question,[15] we respectfully refer to our brief in No. 75-7056, at pages 12-15.

14/ In general terms, Rule 15c2-11 prohibits initiation or resumption of quotations in infrequently traded securities by broker-dealers unless they are in possession of certain current financial and other information with respect to the issuer involved. See, Securities Exchange Act Release No. 9310, September 13, 1973.

15/ "It is axiomatic that a court order must be obeyed, even assuming its invalidity, until it is properly set aside." Leighton v. Paramount Pictures Corporation, 340 F.2d 859, 861 (C.A. 2, 1955), citing United States v. United Mine Workers of America, 330 U.S. 258, 289-295 (1947).

Rule 15c3-1, 17 C.F.R. 240.15c3-1, establishes minimum net capital requirements for broker-dealers and Rule 17a-5, 17 C.F.R. 240.17a-5, requires that registered broker-dealers and exchange members make certain reports of financial condition to the Commission. Financial responsibility regulations of this kind, designed to protect the public are, of course, commonplace at both the federal and state levels with respect to financial institutions of all kinds and any discussion of their constitutionality is superfluous.[16/]

Mr. Sloan's complaint challenges section 12(g) of the Securities Exchange Act, 15 U.S.C. 781(g), which imposes filing requirements upon certain classes of issuers of securities (App. 59). Even if this contention had merit, Mr. Sloan made no showing that he was a member of those classes of issuers and, accordingly, he was without standing to sue with respect to that provision. See, United States v. Students Challenging Regulatory Agency Procedure, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727, 732-733 (1972).

Since there was no likelihood of success on the merits of any of Mr. Sloan's Constitutional challenges, Judge Griesa correctly denied Mr. Sloan's motion to convene a three-judge court (App. 172,185), cf., Goosby v. Osser, 409 U.S. 512, 518 (1973).

16/ In any event, Mr. Sloan has already addressed this Court with respect to Rule 15c3-1 in No. 74-1436, his appeal from an order permanently enjoining him from violations of that provision. That appeal was dismissed on January 7, 1976.

III. THE COURT REVIEW PROVISION OF THE SECURITIES EXCHANGE ACT, AS AMENDED BY THE SECURITIES ACTS AMENDMENTS OF 1975, CONTAINS NOTHING WHICH REQUIRES REMAND OF THIS CASE TO THE DISTRICT COURT

The Securities Acts Amendments of 1975 became effective on June 4, 1975,[17/] long after this case was disposed of in the district court. But even if the new procedures contained in the amended section 25 of the Securities Exchange Act, 15 U.S.C. 78y, had been effective at the appropriate time, they would be wholly irrelevant in the context of this case. Subsection (b) of section 25, as amended, provides a means for seeking review of newly promulgated Commission rules:

> "(b)(1) A person adversely affected by a rule of the Commission promulgated pursuant to section 6, 11, 11A, 15(c)(5) or (6), 15A, 17, 17A or 19 of this title may obtain review of this rule in the United States Court of Appeals . . . by filing in such court, within sixty days after the promulgation of the rule, a written petition requesting that the rule be set aside." (emphasis added).

Subsection (c)(3) of section 25 now provides that "when the same order or rule is the subject of one or more petitions for review filed under this section and an action for enforcement filed in a district court . . . that court in which the petition or the action is first filed has jurisdiction with respect to the order or rule" (emphasis added). All of the rules involved in Mr. Sloan's various challenges and all of the rules involved in the Commission's

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17/ Later effective dates were specified for certain of the amendments (not including the amendments to Section 25).

enforcement actions are of long standing and could not possibly be subject to a petition for review under the amended provision. It is difficult to perceive how the amended Section 25 mandates that this original civil action against the Commission and six other defendants be remanded to Judge Griesa.[18/] Mr. Sloan's demand that this case be remanded on the basis of the new provision is frivolous.

18/ Insofar as his analysis can be understood (Br. 14-15), Mr. Sloan has apparently concluded that the new Section 25(c)(3) mandates consolidation of any and all actions involving the Commission and another party. But the transfer provision applies only where "the same order or rule is the subject of one or more petitions for review under this section and an action for enforcement filed in a district court." The Commission's "order" barring Mr. Sloan from association with broker-dealers is the subject of only one petition for review (C.A. 2, No. 75-4087) and no enforcement action. Mr. Sloan's petition for review of Commission "orders" suspending trading in Canadian Javelin, Limited (assuming that these are orders) has already been disposed of. Samuel H. Sloan v. Securities and Exchange Commission, 74-2457, October 15, 1975.

CONCLUSION

For the foregoing reasons the orders of the district court should be affirmed.

Respectfully submitted,

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January, 1976

SECURITIES AND EXCHANGE COMMISSION
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OFFICE OF THE
GENERAL COUNSEL

January 23, 1976

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Clerk, United States Court of Appeals
For the Second Circuit
United States Courthouse
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New York, New York 10007

Re: Samuel H. Sloan, Samuel H. Sloan & Co. v. Securities and Exchange Commission, et al., No. 75-7283.

Dear Mr. Fusaro:

Enclosed for filing are twenty-five copies of the Commission's answering brief in this action.

I certify that I have caused two copies of the Commission's brief to be served by mail upon the following:

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